

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
Plaintiff,

CR. NO. S-95-0020 EJJ  
CR. NO. S-96-0089 EJJ  
CIV. NO. S-98-2457 EJJ

v.

JUAN AGUILAR CORTEZ,  
Defendant.

ORDER DENYING MOTION TO VOID  
JUDGMENT; ORDER TRANSFERRING  
SUCCESSIVE § 2255 MOTION TO  
NINTH CIRCUIT

Defendant, a federal prisoner proceeding pro se, has filed a  
"Motion to Void Judgment on Jurisdictional Grounds". After  
reviewing the record and the documents submitted, as well as the  
applicable law, the court has determined that the motion should  
be construed as a successive § 2255 petition and transferred to  
the Ninth Circuit Court of Appeals.

BACKGROUND

Defendant was convicted, following a jury trial, of multiple  
counts of drug trafficking (Cr. No. S-95-0020 EJJ) and a single  
count of gun possession (Cr. No. S-96-0089 EJJ). He was  
sentenced November 4, 1996 to a term of life imprisonment. His  
conviction and sentence were affirmed by the Ninth Circuit Court

1 of Appeals in an unpublished memorandum. United States v.  
2 Cortez, Nos. 96-10516, 96-10538 (9<sup>th</sup> Cir., filed September 26,  
3 1997). Since the affirmance of his conviction defendant has  
4 mounted numerous challenges in post-conviction proceedings, the  
5 history of which is well-documented in prior orders of the  
6 court.<sup>1</sup> The pending motion is another attempt by defendant to  
7 vacate his convictions.

#### 8 DISCUSSION

9 Reduced to its essence, defendant's motion to void judgment  
10 seeks to vacate his drug trafficking convictions on the grounds  
11 that the issue of drug quantity was not submitted to the jury for  
12 decision but was instead determined by the court as a sentencing  
13 factor. In effect, defendant is arguing that he is entitled to  
14 retroactive application of the Supreme Court's Apprendi v. New  
15 Jersey decision, and its Ninth Circuit progeny. As the  
16 government points out, this is the third time defendant has  
17 raised this issue, first under the guise of a motion for  
18 reconsideration of denial of his § 2255, second, as a motion to  
19 re-open his § 2255 pursuant to Federal Rule of Civil Procedure  
20 60(b), and now as a motion to void his criminal conviction for  
21 lack of jurisdiction, again pursuant to Rule 60(b).

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24 <sup>1</sup> Order Denying Motion to Vacate, Set Aside or Correct Sentence, filed January 25, 2001;  
25 Order Transferring Successive 2255 Motion to Court of Appeals, filed February 26, 2001; Order  
Denying Request for Certificate of Appealability, filed May 4, 2001; Order Denying Motion to  
Reconsider, Transferring Successive Petition to Ninth Circuit, filed February 8, 2005.

1 The vehicle defendant is attempting to utilize, Federal Rule  
2 of Civil Procedure 60(b), is not appropriate for what he seeks to  
3 accomplish. The Rules of Civil Procedure may be used in the  
4 context of habeas proceedings only to the extent they are not  
5 inconsistent with the statutory provisions and rules that apply  
6 to those proceedings. Fed. R. Civ. P. 81(a)(2).

7 The Supreme Court recently spelled out the distinction  
8 between a successive habeas petition and a Rule 60(b) motion, and  
9 noted that the title appended to the motion is not determinative.  
10 See Gonzalez v. Crosby, 125 S.Ct. 2641 (2005). A motion, even  
11 though labeled as one under Rule 60(b), will be treated as a  
12 second or successive habeas petition, and thus subject to the  
13 rules affecting successive petitions, if it raises a "claim" as  
14 that term is defined in 28 U.S.C. § 2244(b). "[A] 'claim' is an  
15 asserted federal basis for relief from a state court's judgment  
16 of conviction." Gonzalez, 125 S.Ct. At 2647.<sup>2</sup> If the motion  
17 attacks the validity of the criminal conviction or sentence, it  
18 is a collateral attack under § 2255, no matter what its label.  
19 Examples of such motions include those seeking to present newly  
20 discovered evidence in support of a claim previously denied,  
21 motions claiming excusable neglect for failure to raise a claim

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23 <sup>2</sup> Although Gonzalez was decided in the context of a federal challenge to a state  
24 conviction arising under 28 U.S.C. § 2254, the principle has been applied to federal habeas  
25 petitions under § 2255 as well by circuit and district courts that have decided the issue. See  
United States v. Scott, 414 F.3d 815 (7<sup>th</sup> Cir. 2005); United States v. Bell, 159 Fed. Appx. 48  
(10<sup>th</sup> Cir. 2005). See also, United States v. Battle, 2006 WL 749460 (D. Kan., filed March 22,  
2006); United States v. Wynne, 2006 WL 3348505 (E.D. Cal., filed November 16, 2006).

1 earlier, and motions contending that subsequent changes in the  
2 law warrant relief. In each instance, such a document, "although  
3 labeled a Rule 60(b) motion, is in substance a successive habeas  
4 petition and should be treated accordingly." Gonzalez, 125 S.Ct.  
5 at 2647.

6 On the other hand, if the motion attacks the integrity of  
7 the habeas *proceedings*, for example challenging the court's  
8 failure to reach the merits of the habeas petition, the motion  
9 may properly be considered to arise under Rule 60(b). Gonzalez,  
10 125 S.Ct. at 2651. Here, defendant wants the benefit of the rule  
11 of law decided by Apprendi and its progeny applied to his  
12 conviction. However, since Apprendi was not made retroactive on  
13 collateral attack by the Supreme Court, any attempt by defendant  
14 to raise it post-conviction will be unavailing. In a case  
15 similar to the one at bar, the court held that defendant's 60(b)  
16 motion was in effect a successive § 2255 petition. United States  
17 v. Battle, 2006 WL 479460 (D. Kan, filed March 22, 2006). There  
18 the defendant claimed "entitlement to relief from his sentence  
19 based on the impropriety of judicial fact-finding at sentencing  
20 under the regime set out in the United States Sentencing  
21 Guidelines." Battle, 2006 WL 479460 \*3. However, the district  
22 court, citing Gonzalez, concluded that such claims were habeas  
23 claims not properly brought in a 60(b) motion.

24 Based on the foregoing, the court finds that defendant's  
25 motion is, in substance, a successive § 2255 motion. As such,

1 pre-filing authorization is required from the appellate court.  
2 Accordingly, as it has done on two prior occasions in this case,  
3 the court is transferring defendant's motion to the appellate  
4 court. The Clerk of Court is directed to transfer this motion to  
5 the Ninth Circuit Court of Appeals. See 28 U.S.C. § 1631  
6 (transfer in the interests of justice). See also Ninth Circuit  
7 Rule 22-3 (successive § 2255 shall be referred by district court  
8 to appellate court.)

9 IT IS SO ORDERED.

10 Dated: May 2, 2007

11 \_\_\_\_\_ /s/ Edward J. Garcia  
12 EDWARD J. GARCIA, JUDGE  
13 UNITED STATES DISTRICT COURT  
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